IN THE

Supreme Court of the United States

October Term, 1942.

No. 604.

S. H. SQUIRE, as Superintendent of Banks of the State of Ohio, in charge of the liquidation of the business and property of The Union Trust Company,

Petitioner,

vs.

CLIFFE U. MERRIAM,

Respondent.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED.

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PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Superintendent of Banks of the State of Ohio and presents this application for a rehearing of his petition for certiorari in this cause:

I.

Jurisdiction.

The petition for certiorari was filed on December 29, 1942; and was denied on February 1, 1943. This petition is filed within less than twenty-five days thereafter, under Rule 33.

II.

Grounds for Rehearing.

This petition for a rehearing should be granted for the following reasons:

First—Undeniably, this cause involves "a federal question of substance."

It was never assumed that the importance of the case here would be measured by such questions as the interim repeal of bank stockholders' liability statutes, both state and federal, or the social and economic considerations favoring or opposing super-added liability of stockholders.

Nor is it an important federal question whether the Ohio Superintendent of Banks is to receive the sums sued for.

Rather, the "federal question of substance" presented here is whether or not the courts of California may, with impunity, deny full faith and credit to the public acts of a sister state. It is this question which invokes the sound judicial discretion of this Honorable Court to review the case at bar on writ of certiorari.

Although California enforces the assessments of her own Superintendent of Banks [See: *Richardson v. Craig,* 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938)], she persistently refuses to enforce like assessments coming from other states.

By the convenient device of construing the anomalous provisions of Section 359 of her Code of Civil Procedure so as to fit the necessities of each case, California contrives to evade enforcement of such assessments—regardless of the state of origin. As the dissenting justices of the California Supreme Court point out, "the application

of that section to a stockholders' liability created under the laws of another state raises major issues that have been disregarded in the present case as in those that preceded it." [R. 81.]

See:

[Colorado] *Miller v. Lane,* 160 Cal. 90, 116 P. 58 (1911);

[Indiana] *State of Indiana v. Hoffman,* 53 Cal. App. (2d) 796, 128 P. (2d) 162 (Hearing denied by Cal. Sup. Ct., (1942);

[Iowa] *Bates v. Blake,* 103 Cal. App. Dec. 26, 105 P. (2d) 940 (1940) (this decision, which *gave* full faith and credit to an Iowa assessment, was vacated by the Cal. Sup. Ct., 100 Cal. Dec. 545 (i), Nov. 19, 1940);

[Maryland] *Hospelhorn v. Newhoff,* 43 Cal. App. (2d) 678, 111 P. (2d) 688 (Hearing denied by Cal. Sup. Ct., 1941);

[Maryland] *Hospelhorn v. Van Dusen,* 40 Cal. App. (2d) 257, 104 P. (2d) 888 (Hearing denied by Cal. Sup. Ct., 1940);

[Ohio] *State of Ohio v. Porter,* 21 Adv. Cal. 46, 129 P. (2d) 691 (1942);

[Ohio] *Squire v. Merriam,* 21 Adv. Cal. 59, 129 P. (2d) 698 (1942).

This cumulative record of California's denial of full faith and credit to the public acts of sister states cannot be passed off as "mere misconstructions" of the laws of

such states. The evidence is overwhelming against California.

Moreover, the same specious suggestion as to "mere misconstructions" has been rejected by this Court in every case in the line from *Converse v. Hamilton*, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912) to *Chandler v. Peketz*, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936).

And see:

> Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926), 39 Harv. L. Rev. 533, 550.

The constitutional command of the full faith and credit clause must be observed; and this Court, *itself*, will examine the laws of Ohio in order to assure that observance.

> *Titus v. Wallick*, 306 U. S. 282, 59 S. Ct. 557, 83 L. ed. 653 (1939);
>
> *Adam v. Saenger*, 303 U. S. 59, 58 S. Ct. 454, 82 L. ed. 649 (1938).

On re-examination of the petition for certiorari and the supporting brief at bar, it appears that it was tacitly assumed, rather than expressly demonstrated, that the fundamental federal issue here is clearly this:

The full faith and credit clause (U. S. Const., Art. IV, §1) *requires California to recognize and enforce the Ohio assessment. That being true, the judgment must be reversed.* For it is admitted on all sides that if the Constitution compels California to entertain the suit as one *upon the Ohio assessment*, then the petitioner must prevail [R. 77, 78, 83].

Perhaps this basic truism has been overlooked because of the volume of talk about a "statute of limitations" in the case at bar. *If, as seems clear, California is required to admit the Ohio Superintendent of Banks to her courts for the purpose of suit upon the assessment, there can be no statute of limitations problem here.* For it follows as day the night that no California statute of limitations has run against the *assessment.*

Hence the judgment in this cause must hinge entirely upon the federal question of whether the full faith and credit clause compels California to enforce the Ohio assessment and recognize it as the basis of the cause of action vested in the Ohio Superintendent of Banks.

That is the clear-cut constitutional issue here.

Prevention of state court disregard for the full faith and credit clause is an essential function of this Court in the preservation of the federal system. As Mr. Justice Holmes said:

> ". . . I am unable to reconcile with the requirements of the Constitution, article 4, §1, the notion of a judgment being valid and binding in the state where it is rendered, and yet depending for recognition to the same extent in other states of the Union upon the comity of those states. No doubt some color for such a motion may be found in state decisions. *State courts do not always have the Constitution of the United States vividly present in their minds. . . . But there is no exception in the words of the Constitution."* (Italics added.)
>
> —Dissenting opinion in *Haddock v. Haddock,* 201 U. S. 562, 632, 633, 26 S. Ct. 525, 50 L. ed. 867, 895, 896 (1906).

In the words of Mr. Justice Brandeis in *Broderick v. Rosner,* 294 U. S. 629, 643, 55 S. Ct. 589, 79 L. ed. 1100, 1107 (1935):

> "A State may adopt such system of courts and form of remedy as it sees fit. . . . But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties. Christmas v. Russell, 5 Wall. 290, 300, 18 L. ed. 475, 478."

Second—Considering "the nature of the Union,"[1] *it is an especial function of this Court to correct and reprove flouting of the full faith and credit clause.*

The full faith and credit clause guarantees the unimpaired continuance of the federal system by the exertion of constitutional compulsion upon state courts. The state court itself cannot act as referee. Of necessity, then, when the issue of full faith and credit is in the balance, "this Court is the final arbiter."

> *Williams v. North Carolina,* 87 L. ed. (Adv. Ops.) 189, 197 (Dec. 21, 1942);
>
> *Milwaukee County v. M. E. White Co.,* 296 U. S. 268, 274, 56 S. Ct. 229, 80 L. ed. 220, 226 (1935).

Manifestly, this must be so whether the case from the state court involves a small sum, or many thousands as in this series of litigation. [*Cohens v. Virginia,* 6 Wheat. 264, 5 L. ed. 257, 286 (1821).] It is the vital "federal

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[1]Madison, Journal of Constitutional Convention (1893), 460, 625.

clause" which is subjected to challenge. It is the federal system established by the Constitution which is being tested.

There is thus presented an important question of constitutional law sustaining the issuance of a writ of certiorari to the California Supreme Court. [*Adam v. Saenger*, 303 U. S. 59, 58 S. Ct. 454, 82 L. ed. 649 (1938).] The vitality of the constitutional requirement of full faith and credit is at stake. For, as Mr. Chief Justice Stone says:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore *obligations created under the laws* or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." (Italics added.)
>
> *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 276-277, 56 S. Ct. 229, 80 L. ed. 220, 228 (1935).

And the preservation of the force and effect of the clause rests with this Court in its function as "final arbiter." The issue here is genuinely constitutional.

Third—Rooted in the full faith and credit clause is the guaranty that obligations arising by virtue of the public acts of another state of the union will be recognized and enforced in the state of the forum.

The abridgment of this guaranty by any state gives rise to a constitutional question of *nation-wide importance* challenging the operation of the federal system, *regardless*

of the particular right involved, regardless of who the particular litigants may be, regardless of the amount in controversy.

The organic significance of the full faith and credit question transcends the immediate importance of the particular lawsuit.

> *John Hancock Mutual Life Ins. Co. v. Yates,* 299 U. S. 178, 57 S. Ct. 129, 81 L. ed. 106 (1936);
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> *Milwaukee County v. M. E. White Co.,* 296 U. S. 268, 56 S. Ct. 229, 80 L. ed. 220 (1935).

And the importance of the federal question at bar is not lessened one whit by the circumstance that the provisions for double liability of Ohio bank stockholders were repealed as of July 1, 1937. [Ohio Const., Art. XIII, §3, as amended Nov. 3, 1936.] Within scarcely more than a year this Court has twice reviewed by certiorari similar questions respecting the double liability of national bank stockholders.

> *Fisher v. Whiton,* 87 L. ed. (Adv. Ops.) 167 (Dec. 7, 1942);
>
> *Rawlings v. Ray,* 312 U. S. 96, 61 S. Ct. 473, 85 L. ed. 605 (1941).

In *Fisher v. Whiton,* 87 L. ed. (Adv. Ops.) 167, 168 (Dec. 7, 1942), this Court pointed out:

> "The importance of the question in administration of insolvent national banks . . . caused us to grant certiorari."

Appended to the foregoing is footnote "5", which explains:

> "The double liability feature of national bank stock has been eliminated, but this does not apply

to banks in difficulty prior to July 1, 1937, except as to stock issued after June 16, 1933. 12 USCA §64(a)."

By the same token, the fact that the double liability feature of Ohio bank stock "has been eliminated," does not detract from the importance of the constitutional question here. As this Court said in *Broderick v. Rosner,* 294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108 (1935):

> "Here the nature of the cause of action brings it within the scope of the full faith and credit clause.
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> * * * * * * * *
>
> *"The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause . . . because statutes are 'public acts' within the meaning of the clause."* (Italics added.)

Obviously, Section 359 of California's Code of Civil Procedure cannot preclude the suit at bar—any more than Section 94(b) of New Jersey's Corporation Act could preclude the suit in *Broderick v. Rosner,*[2] or Section 8604 of Tennessee's Code the suit in *Fisher v. Whiton.*[3]

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[2]294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108, (1935).

[3]87 L. ed. (Adv. Ops.) 167 (Dec. 7, 1942).

Fourth—The judgment of the California Supreme Court is in direct conflict with the settled constitutional law that a refusal to recognize and enforce the Ohio assessment of liability against stockholders is a denial of full faith and credit to the public acts of a sister state.

Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936);

Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935);

Converse v. Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912).

Here is an Ohio assessment, protected by the Constitution of the United States, awaiting enforcement in California. So fundamental is the constitutional mandate that this Court not long ago reversed the Supreme Court of Colorado in a *per curiam* opinion on certiorari and ordered enforcement of a Minnesota assessment forthwith.

See:

Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936).

If the full faith and credit cases going before have any force, it is that the Supreme Court of the United States should and will assume jurisdiction over this cause, reverse the judgment of the California Supreme Court, and direct enforcement of the Ohio assessment because of the constitutional mandate of the full faith and credit clause. The Constitution of the United States commands California to enforce the Ohio assessment, and it but remains for this command to be given effect here.

If the case at bar involved a national bank assessment sought to be enforced in the courts of California, this

Court unquestionably would review California's grotesque application of Section 359 of her Code of Civil Procedure. In such a case, this Court would feel compelled to act in performance of its duty to protect and preserve a federal institution.

See:

Rankin v. Barton, 199 U. S. 228, 230, 231-232, 26 S. Ct. 29, 30, 50 L. ed. 163, 166 (1905);

Rawlings v. Ray, 312 U. S. 96, 99, 61 S. Ct. 473, 474, 85 L. ed. 605, 608 (1941);

Fisher v. Whiton, 87 L. ed. (Adv. Ops.) 167 (Dec. 7, 1942).

The same impelling considerations, it is submitted, require review of the state court action in the case at bar. For if there exists any federal institution that this Court should ever protect and preserve inviolate, it is the full faith and credit clause—the "federal clause."

Fifth—Weighed with the importance of the "federal clause," this Court's burden in reviewing cases arising under Article IV, Section 1, seems light indeed.[4]

The preservation of the right is vested in this Court. This all important judicial function in the national system

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[4]Hart, The Business of The Supreme Court at the October Terms, 1937 and 1938 (1940), 53 Harv. L. Rev. 579, 593;
Frankfurter and Fisher, The Business of The Supreme Court at the October Terms, 1935 and 1936 (1938), 51 Harv. L. Rev. 577, 601;
Frankfurter and Hart, The Business of The Supreme Court at the October Term, 1934 (1935), 49 Harv. L. Rev. 68, 81;
Frankfurter and Hart, The Business of The Supreme Court at the October Term, 1933 (1934), 48 Harv. L. Rev. 238, 251;
Frankfurter and Hart, The Business of The Supreme Court at the October Term, 1932 (1933), 47 Harv. L. Rev. 245, 261.

is especially significant where, as in the case at bar, no federal court has passed upon the full faith and credit question prior to request for review here.

It was not intended that so fundamental a right be left to the mercy of the courts of the several states. As Mr. Justice Black observed in *Kalb v. Feuerstein,* 308 U. S. 433, 439, 60 S. Ct. 343, 84 L. ed. 370, 374 (1940):

> "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land."

It is of little consequence whether the petitioner here collects the money in suit. But it is of the greatest consequence that the courts of California be not permitted to deny full faith and credit to the public acts of Ohio, and thus defy the mandate of the Constitution of the United States.

At all times—and particularly in these times—the Supreme Court of the United States should demonstrate that the "federal clause" remains ever a nation-wide unifying force. As Mr. Justice Holmes pointed out with respect to Article IV, Section 1, "there is no exception in the words of the Constitution."[5]

The assessment at bar, being a substantive right conferred by Ohio statute, is entitled to the same faith and credit in California as in Ohio. The courts of Ohio con-

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[5]*Haddock v. Haddock,* 201 U. S. 562, 632, 633, 26 S. Ct. 525, 50 L. ed. 867, 895, 896 (1906).

sistently recognize and enforce the obligations of bank stockholders arising from the Ohio Superintendent's assessments. Thus, California's refusal to recognize and permit suit upon the Ohio Superintendent's statutory cause of action constitutes a rank denial of full faith and credit to the public acts of Ohio.

Broderick v. Rosner, 294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108 (1935).

The liability of stockholders of an Ohio state bank may not be "a federal question of substance." *But California's unconstitutional denial of full faith and credit to the public acts of Ohio indisputably is.*

With the question as now presented, it is hoped that this Honorable Court will again read the petition for certiorari and the supporting brief. And it is believed that upon such reconsideration, the irrefutable logic of the opinion of the dissenting justices of the California Supreme Court will be given approval here. [R. 79-85.]

Conclusion.

For the foregoing reasons, your petitioner, the Superintendent of Banks for the State of Ohio, respectfully urges that a rehearing be granted; that upon further consideration, the order of February 1, 1943, denying certiorari, be vacated; that the writ of certiorari issue as prayed for;

and that the judgment of the Supreme Court of the State of California be, upon further consideration, reversed.

Respectfully submitted,

S. H. SQUIRE,
Superintendent of Bank for the State of Ohio, in Charge of the Liquidation of the Business and Property of The Union Trust Company of Cleveland, Ohio, Petitioner,

By WILLIAM C. MATHES,
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Special Counsel to the Attorney General of the State of Ohio;

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GORDON F. HAMPTON,
Of Counsel.

Certificate of Counsel.

I, WILLIAM C. MATHES, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

WILLIAM C. MATHES,
Counsel for Petitioner.